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In the
Supreme Court of the United States

BOY SCOUTS OF AMERICA, *et al.*,
Petitioners,

v.

JAMES DALE,
Respondent.

On Writ of Certiorari to the Supreme Court of New Jersey

BRIEF FOR THE INSTITUTE FOR PUBLIC AFFAIRS OF THE UNION OF ORTHODOX JEWISH CONGREGATIONS OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

NATHAN J. DIAMENT
INSTITUTE FOR PUBLIC AFFAIRS
THE UNION OF ORTHODOX JEWISH
CONGREGATIONS OF AMERICA
1640 Rhode Island Avenue, NW
Washington, DC 20036
(202) 857-2770

PRESS OF BYRON S. ADAMS ✦ WASHINGTON, D.C. ✦ 1-800-347-8208

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INTRODUCTION AND INTEREST OF *AMICUS*

This case raises the question of whether a state law compelling a Boy Scout troop to appoint an avowed homosexual and gay rights activist as an assistant scoutmaster abridges the First Amendment rights of freedom of speech and freedom of association. The court below held that the Boy Scouts' First Amendment rights were not abridged. *Dale v. Boy Scouts of America et. al.*, 160 N.J. 562 (1999).

Amicus believes that the New Jersey Supreme Court has misread this Court's precedents, and that the First Amendment rights of America's many civic, cultural and religious associations have been placed at risk by the decision below.

The Union of Orthodox Jewish Congregations of America[1] (the "U.O.J.C.A.") is a non-profit organization composed nearly 1,000 Jewish congregations throughout the United States. It is the largest Orthodox Jewish umbrella organization in this nation. Through its Institute for Public Affairs, the U.O.J.C.A. researches and advocates legal and public policy positions on behalf of the Orthodox Jewish community. The U.O.J.C.A. has filed, or joined in filing, briefs with this Court in many of the important cases which affect the Jewish community and American society at large. *See, e.g., Vacco v. Quill*, 521 U.S. 793 (1997); *Bd. of Ed. of Kiryas Joel v. Grumet*, 512 U.S. 687 (1994); *Zobrest v. Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993).

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[1] Pursuant to Rule 37.6 of this Court, we represent no party or party's counsel authored this brief in whole or in part and no person or entity other than the *amicus curiae*, its members, or its counsel, have made a monetary contribution to the preparation or submission of this brief.

Of particular relevance to the case at bar, the U.O.J.C.A. is the parent organization of the National Conference of Synagogue Youth ("NCSY"). One of the world's most successful Jewish youth movements, NCSY provides educational, religious and social programming for over 40,000 American teenagers annually through weekend retreats, summer trips and after-school clubs. NCSY's mission is one that is religious, but invites any Jewish teen, regardless of their level of affiliation or observance, to participate. Clearly, the case at bar has grave implications in the long term for youth organizations such as NCSY, as it may impact upon their future ability to develop and apply criteria for the selection of youth groups leaders and members.

We are supporting the petitioners in this case because we believe that this Court must protect the First Amendment rights of those private associations which form the fabric of our civil society and that the decision below is at odds with this Court's precedents in this area. Moreover, we believe that should this Court uphold the ruling of the court below, it must simultaneously provide a clear safe-harbor for the activities of America's religious associations and institutions by revisiting this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990).

We have obtained the consent of the parties to file this brief. We acknowledge that the opinions of the lower courts and the briefs of the parties to this case have raised many of the arguments which this Court must consider in rendering its decision herein. *Amicus* offers this brief to the Court with the purpose of clarifying the position of the mainstream Orthodox Jewish community in this case.

SUMMARY OF ARGUMENT

1. The Court should reverse the holding of the Supreme Court of New Jersey. This Court's precedents recognize the fundamental nature of the First Amendment's guarantee that Americans may gather together, informally or through civic organizations, for the purpose of forming an "expressive association." In *Roberts v. Jaycees, Rotary International v. Rotary Club of Duarte* and *Hurley v. Irish-American Gay, Lesbian & Bisexual Club of Boston*, this Court has further recognized that part and parcel of the right of expressive association is the determination of the form and content of the message to be expressed. Moreover, this Court has recognized that this determination rests in the hands of the association itself; that for a law, regulation or court edict to manipulate the membership of a private association by compelling the inclusion of those who dissent from the message to be expressed is exactly the same as compelling the association to alter its expression. The decision below runs counter to these precedents and should, therefore, be reversed.

2. Should this Court affirm the ruling of the Supreme Court of New Jersey, *Amicus* respectfully submits that this Court must simultaneously provide a clear safe-harbor for the activities of America's religious associations and institutions by revisiting this Court's decision in *Employment Division v. Smith*. There is no question that the state statute that his given rise to this entire controversy is properly characterized as a "general law of neutral applicability" which has not singled-out religious free exercise as a target of discriminatory treatment. In fact, New Jersey's Law Against Discrimination contains a religious educational facility exception. But the very need for that exception and the holding of the court below highlights the risk religious associations are exposed to should the decision

below be affirmed and this Court not revisit its decision in *Employment Division v. Smith*. Religious associations will be at the mercy of local legislatures and their devotion to popular fashion. While some legislatures will provide exceptions within their gay rights laws for the activities of religious institutions and associations, others will not. In the absence of a robust protection for the free exercise of religion – one which insists that state laws or regulations that infringe upon that "first freedom" may only do so when serving a compelling state interest via the means least restrictive to religious liberty – nothing stands in the way of religious associations being coerced to disband or violate their tenets.

ARGUMENT

I. THE FIRST AMENDMENT'S GUARANTEE OF FREEDOM OF ASSOCIATION PROTECTS THE RIGHT OF PRIVATE ASSOCIATIONS TO DETERMINE THEIR MEMBERSHIP AND LEADERSHIP CRITERIA.

Amicus is keenly aware that petitioner's counsel will provide the Court with a comprehensive argument as to the Free Association and Free Speech rights implicated in this case and why, under this Court's precedents, the ruling below should be reversed. *Amicus*, therefore, associates itself with petitioner's argument on these points and will only briefly highlight those aspects of this line of analysis that directly implicate the interests of *amicus*.

A. FREEDOM OF EXPRESSIVE ASSOCIATION IS IMPERILED WHEN A LEGISLATURE OR COURT MAY DETERMINE THE MEMBERSHIP CRITERIA AND MISSION STATEMENT OF A PRIVATE ASSOCIATION

In ruling below that petitioners do not enjoy the First Amendment's guarantee of freedom of expressive association and are subject to New Jersey's Law Against Discrimination ("LAD"), N.J.S.A. 10:5-1 *et. seq.*, the New Jersey Supreme Court resorted to two lines of analysis that imperil any civic association that would enjoy this basic freedom.

First and foremost, the court below took it upon itself to substitute its interpretation of the Boy Scout Oath and Law for that offered by the very association that produced it and lived under that Oath and Law for its entire history. 160 N.J. at 613-616. This assertion by the lower court seems to run squarely

counter to this Court's recent statements on this freedom. In *Hurley v. Irish-American*, 515 U.S. 557, 573 (1995) this Court recognized that "under the First Amendment...a speaker has the autonomy to choose the content of its own message."

This basic understanding is also contained in Justice O'Connor's concurrence in *Roberts v. Jaycees*, 468 U.S. 609, 633 (1984): "Protection of the association's right to define its membership derives from the recognition that the formation of an expressive association is the creation of a voice, and the selection of members is the definition of that voice." In the instant case, the New Jersey Supreme Court has taken it upon itself to form the voice of the Boy Scouts of America.

The New Jersey's court's conduct, in this regard, is quite striking. In assessing the Scout Oath and Law, the court first quoted extensively from the Boy Scout Handbook's interpretive comments on that document. 160 N.J. at 614. Then, rather than accept the interpretation of these documents offered by the Scouts, the court marshaled evidence from *amicus* briefs to establish the proposition that "[o]n the record before [the court], it appears that no single view on this subject functions as a unifying associational goal of the organization." 160 N.J. at 615.

If the Boy Scouts choose to couch their position on homosexuality in terms more subtle than a no-holds-barred explicit assault on that lifestyle, that is for the Boy Scouts to choose, not the state court. The Boy Scouts may also wish to create affiliations with other civic organizations that disagree with their view on this issue, for any number of reasons – that too, is a choice for the Scouts. If the lower court's action in this regard is upheld, it will essentially force every association – civic and religious – that may otherwise wish to finesse a

highly-charged issue such as its attitude toward those who engage in homosexual conduct into crafting its own internal "legislative history" in preparation for possible litigation. Private associations should not be forced to so blatantly choose sides in this debate if they do not so desire.

The second line of analysis employed by the court below relies upon this Court's decision in *Rotary International v. Rotary Club of Duarte*, 481 U.S. 537 (1987), a case that is clearly distinguishable from the case at bar. In *Rotary*, this Court held that a California law requiring civic associations, including Rotary Clubs, to admit women did not violate Rotary's First Amendment rights. In relying upon *Rotary*, the New Jersey Supreme Court focused particularly upon this Court's determination that inasmuch as "Rotary Clubs do not take positions on 'public questions,' including political or international issues" their expressive association rights are not infringed by the state compelling them to alter their membership policy (in that case, to include women). *See* 160 N.J. at 615 (citing *Roberts*, 481 U.S. at 548; "[Dale's] 'inclusion would not affect in any significant way Boy Scouts existing members' ability to carry out their various purposes.'")

This lynchpin in the New Jersey Supreme Court's argument is inherently flawed. While the Boy Scouts of America as an entity, might be so large and so open to recruiting many members as to remove it, like Rotary Clubs, from the category of those entities afforded the freedom of intimate association, that is where the similarity ends. The Boy Scouts have promulgated a Scout Law and Oath which clearly sets forth, albeit subtly, statements of moral and civic principles which form the core of its expressive, associative message. While local legislatures and courts might not agree with this component of their expressive message, they must

respect the right of the Boy Scouts and other associations to choose their message. That is what the First Amendment requires.

II. RELIGIOUS ASSOCIATIONS MUST BE GRANTED A SAFE HARBOR FOR THEIR ACTIVITIES; THUS, SHOULD THIS COURT AFFIRM, THIS COURT MUST REVISIT *EMPLOYMENT DIVISION v. SMITH*, 494 U.S. 872 (1990).

The decision of the New Jersey Supreme Court highlights the great risk to which private religious associations will be exposed should this Court affirm. Thus, if this Court rules for Respondent Dale, it should simultaneously revisit its holding in *Employment Division v. Smith*, 494 U.S. 872 (1990), and provide a safe-harbor for religious associations and their activities.

A. THE RULING BELOW HIGHLIGHTS THE EXPOSURE OF RELIGIOUS ASSOCIATIONS AND THEIR FIRST AMENDMENT FREE EXERCISE RIGHTS TO THE WHIM OF LEGISLATURES

Petitioners below asserted that they were exempt from the provisions of the LAD under its religious institution exemption. 160 N.J. at 601. That exemption simply states that the LAD's provisions do not apply to an "educational facility operated or maintained by a bona fide religious or sectarian institution." N.J.S.A. 10:5-5l. While it has traditionally been the case that religious institutions are provided with exemptions from various civil rights laws enacted, *see e.g.* 42 U.S.C. 2000e-2(e) and proposed, *see e.g.* S.1276, 106th Cong. 1st Sess. (1999) (Cong. Rec. S7596 (daily ed. June 24, 1999) (Introduction of "Employment

Non-Discrimination Act of 1999"), this practice is by no means guaranteed. It places religious communities and their institutions in the position of being dependant upon the mercy of legislatures or amassing sufficient political power to force the inclusion of such exemptions. Neither of these are prospects that religious communities relish, nor are they consistent with the Framers' concerted effort to ensure that religious liberty was removed from the political bargaining table.

Of the many important insights America's founders possessed was their appreciation of the risks of majoritarianism. James Madison succinctly expressed this insight by propounding the need to foster a "multiplicity of sects" to secure religious liberty in America. *The Federalist*, No. 51, at 326 (Lodge ed. 1908). To safeguard the flourishing of a religiously pluralistic society and especially ensure that minority religions would not find themselves at the mercy of the adherents of the majority religion (or non-religion), the Framers enshrined religious liberty in the First Amendment's Free Exercise Clause. Through the clause's handful of words, the Framers sought to "single out religion for special protections." McConnell, *Accommodation of Religion*, 1985 S.Ct.Rev. 1, 9.

As Justice Jackson recognized in overruling *Minersville Sch. Dist. v. Gobitis*, 310 U.S. 586 (1940): "The very purpose of the Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials... One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections." *West Virginia v. Barnette*, 319 U.S. 624, 638 (1943).

To understand the current risks now faced by our nation's religious associations, one need only consider what any bona fide religious organization might confront if the New Jersey Legislature had not included the "religious educational facility exemption" in the LAD. This scenario is easily imaginable. It is easy to contemplate in the current political environment that the proponents of the LAD, or similar legislation in another state or locality, might oppose such an exemption and insist that all institutions – public and private, secular and sectarian – comply with its demands. In such a circumstance, any religious organization which continues to believe in the unfashionable notion that homosexual conduct is sinful, *see Leviticus* (20:13), and that openly gay individuals are inappropriate leaders or members of its institution will face the simple choice of violating the law, disbanding, or violating the tenets of their religious faith. Any of these choices is unacceptable and should not be compelled by this Court's jurisprudence which currently places law and religion at loggerheads.

B. REVISITING *EMPLOYMENT DIVISION v. SMITH*'S HOLDING IS THE ONLY WAY TO PROVIDE RELIGIOUS ASSOCIATIONS WITH THEIR CONSTITUTIONALLY MANDATED SAFE HARBOR

This Court is well aware that local and state legislatures can be insensitive to the needs of religious minorities, *see Cantwell v. Connecticut*, 310 U.S. 296 (1940) *Wisconsin v. Yoder*, 406 U.S. 205 (1972). Yet, under *Emp. Div. v. Smith, supra*, and then again in *City of Boerne v. Flores*, 521 U.S. 507 (1997), the Court has cast the fate of religious associations into the hands of state legislatures and city councils.

The abuse that religious institutions and individuals have suffered at the hands of state and local

laws and regulations insensitive to religious liberty concerns has been well documented. *See*, Cong. Rec. H5580-H5608 (daily ed. July 15, 1999) (Consideration of H.R. 1691, Religious Liberty Protection Act); *Religious Liberty Protection Act: Hearing on H.R. 1691 Before the Subcomm. On the Constitution of the House Comm. on the Judiciary*, 106th Cong. (May 12, 1999); *Religious Liberty Protection Act: Hearings on H.R. 4019 Before the Subcomm. on the Constitution of the House Comm. On the Judiciary*, 105th Cong. (June 16, 1998).

Justice O'Connor, and the dissenters who joined her in *Smith*, recognized the troubling nature of the Court's holding in that case and that it would inevitably lead to the circumstances we are bringing to the Court's attention herein. Similarly, in *City of Boerne*, Justice O'Connor called upon the Court to "correct the misinterpretation of the Free Exercise Clause set forth in *Smith*...put [the Court's] First Amendment jurisprudence back on course and allay the legitimate concerns of [those] who believe[] that *Smith* improperly restricted religious liberty." 521 U.S. at 545. We respectfully request the Court to do so here in light of the risks to religious associations outlined above.

Justice O'Connor properly noted in *Smith* that "there is nothing talismanic about neutral laws of general applicability...for laws neutral toward religion can coerce a person to violate his religious conscience or intrude upon his religious duties just as effectively as laws aimed at religion." 494 U.S. at 901. Inasmuch as the ruling of the New Jersey Supreme Court in the instant case highlights for this Court yet another concrete context in which such coercion may be easily directed at religious associations through a seemingly innocuous general law of neutral applicability, this Court should find compelling the need to reinstate the

safe harbor for religious liberty the Free Exercise Clause was intended to be. For this Court to fail to take up this cause is to continue to turn its back on one of the cornerstones upon which the United States was constructed.

CONCLUSION

In its ruling below, the New Jersey Supreme Court substituted its interpretation of the Boy Scouts' mission and tenets for that asserted by the Boy Scouts itself; it dismissed any suggestion that the Boy Scouts ought to be able, as a private association, determine its membership and leadership criteria and enjoy the First Amendment protections this Court's properly understood precedents afford private associations. Moreover, the New Jersey Supreme Court's opinion exposed the risk now borne by America's private civic and religious associations under current First Amendment jurisprudence.

For the foregoing reasons, the judgments of the Supreme Court of New Jersey should be reversed.

Respectfully submitted,

NATHAN J. DIAMENT
(Counsel of Record)
INSTITUTE FOR PUBLIC AFFAIRS, U.O.J.C.A.
1640 Rhode Island Ave., NW
Washington, DC 20036
(202) 857-2770